Filed 1/11/10 In re Antonio D. CA1/2

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

In re ANTONIO D., a Person Coming Under the Juvenile Court Law.	
THE PEOPLE, Plaintiff and Respondent, v. ANTONIO D., Defendant and Appellant.	A122751 (Alameda County Super. Ct. No. C-189897)

Antonio D. appeals from orders of the juvenile court committing him to the Department of Juvenile Justice. He contends the court erred in failing to offer him a *Marsden*[1] hearing; the record does not demonstrate he was competent to admit the allegations of the present petition; the juvenile court failed to exercise its discretion in setting the maximum term of confinement; there was insufficient evidence appellant would benefit from the commitment; and the commitment in this case constitutes cruel and unusual punishment. We affirm.

STATEMENT OF THE CASE AND FACTS

Appellant was first declared a ward of the Alameda County Juvenile Court (Welf. & Inst. Code, § 602) on May 25, 2004, on his admission of an attempted robbery (Pen.

[1] *People v. Marsden* (1970) 2 Cal.3d 118 (*Miranda*).

Code, §§ 664, 211), and placed on probation in his mother's custody. In the underlying incident, police observed appellant, then 12 years old, and E.J. for 45 minutes in the parking lot of the Oakland BART station on the night of April 28, 2004. Approximately six times E.J. would point to a female walking alone and appellant would run up to her, show her a piece of paper, walk alongside her, then walk back to E.J. After E.J. pointed to the victim, appellant approached and asked if she had money, then grabbed her bag from her shoulder; they struggled and the victim got control of the bag when the strap appellant was pulling broke.

At that time, appellant lived with his mother in low income housing; his father had been murdered seven years before. His mother described appellant as a follower who was mistreated by neighborhood friends and pressured into committing offenses to earn respect from his peers. He had been cited for fare evasion in January 2004 and the case was closed.

On January 7, 2005, a subsequent petition was filed alleging that appellant had committed misdemeanor receiving stolen property (Pen. Code, § 496) and petty theft (Pen. Code, § 484, subd. (a)). Appellant had been caught attempting to steal a tee shirt, jeans and a sweater from a Sears Department Store by wearing them out of the store without paying. The jurisdictional report noted that appellant had behavioral difficulties in school, including having been suspended for fighting with another student, and had failing grades in all academic subjects. On February 7, appellant admitted the petty theft count and the other count was dismissed.

Before the dispositional hearing, a new petition was filed in San Francisco County on February 22, 2005, alleging (as amended on February 25) misdemeanor burglary (Pen. Code, § 459) and four counts of misdemeanor petty theft (Pen. Code, § 484, subd. (a)) committed on February 7, and one count of felony grand theft (Pen. Code, § 487, subd. (a)) committed on February 21. The burglary count alleged unlawful entry into an ice rink dressing room with intent to commit larceny; the petty theft counts each alleged theft of a wallet and contents; and the grand theft count alleged the taking of personal property including money, a purse, wallet, ring, camera, earrings and cell phone. On

February 23, a subsequent petition was filed in Alameda County, alleging that appellant committed petty theft of a cell phone battery from Electronics Unlimited on January 31, 2005. Appellant was detained in San Francisco on February 23, and subsequently transferred to Alameda County Juvenile Hall. He admitted the burglary and grand theft counts of the February 22 petition, and the other counts were dismissed. The February 23 petition was dismissed at a subsequent hearing.

On March 7, 2005, the court ordered appellant removed from his mother's custody. He remained at Juvenile Hall until March 30, when he was placed at the EE's Group Home in San Jose.

On April 4, a supplemental petition (Welf. & Inst. Code, § 777a) was filed, alleging that appellant had left the group home without permission on March 31, the day after he arrived. The petition was dismissed on April 7, and appellant was ordered detained at Juvenile Hall. On April 15, he was placed at Trinity Ukiah in Mendocino County; on April 24, appellant left the group home.

On April 26, 2005, appellant was arrested in San Francisco for theft of a woman's purse in a Macy's restroom the day before and attempt to commit the same offense that day. A new petition was filed in San Francisco County on April 28, alleging two counts of burglary (Pen. Code, § 459), and one count of attempted grand theft (Pen. Code, §§ 664, 487, subd. (c).) On April 29, a supplemental petition was filed in Alameda County, alleging that appellant left his Trinity Ukiah placement without permission on April 24.

On May 3, appellant admitted one of the burglary counts in the April 28 petition, ,and the other two counts were dismissed. He was transferred to Alameda County where, on May 10, he admitted the allegation of absconding from his placement. He remained in Juvenile Hall.

At the request of the court, appellant underwent a psychological evaluation on April 25. Testing indicated a composite IQ in the 12th percentile, nonverbal reasoning in the 45th percentile, and vocabulary in the third percentile, indicating an expressive language disorder. Behavioral observations indicated "significant distractibility, short

attention span, behavioral immaturity, and oppositional behavior," and "the social judgment of an eight to nine-year-old rather than a 13-year-old." The evaluator found "no evidence of a more significant psychiatric disorder, or a formal thought disorder." He noted that the evaluation was limited by time constraints and lack of information such as school and medical records, and recommended a complete psychological and psychiatric evaluation.

In a May 23 dispositional report, the probation officer stated that appellant "came across as an average energetic teenager" who seemed "open and engaging" and "possessed a rather good understanding of the Court/Probation system despite his young age." The probation officer viewed appellant as a "streetwise and rather sophisticated juvenile delinquent."

On July 6, 2005, appellant was placed at the Maywright Group Home in San Bernardino County. In August, he was reportedly adjusting satisfactorily, complying with program rules and getting along with staff and peers. It was noted that his previous academic performance had been poor and close monitoring of his academic progress was planned.

On January 20, 2006, a supplemental petition was filed alleging that appellant left the group home without permission on January 17. The probation officer reported that appellant had exhibited hyperactivity and a doctor had recommended he take Ritalin, but appellant's mother was opposed to him taking medication. Appellant had received failing grades for the fall semester and had been suspended on numerous occasions.

Appellant was arrested on January 26, 2006, and on February 1 he admitted the allegation, was ordered detained in Juvenile Hall, and was referred for a mental health evaluation. The evaluating psychologist stated that appellant read the test instructions correctly, appeared to understand what was required of him, and did not appear to have difficulty in his reading skills. She estimated his intellectual functioning to be in the "average range," but his insight and judgment "poor," and found appellant to be depressed, with low self esteem, poor impulse control and possible problems with anger management; she viewed his potential for violence to be in the average range and his

delinquent behavior as primarily due to a conduct disorder rather than an emotional disorder. The psychologist recommended individual or group therapy and placement in a group home that could provide a high level of supervision and meet appellant's needs for treatment and special educational services.

In the dispositional report filed February 23, the probation officer described appellant as "very engaging" and having "a caring demeanor," as a "follower," "highly motivated to please his peers" and "prone to mischievous behavior to impress his peers," "streetwise" and "entrenched in the West Oakland 'Lower Bottom' delinquent culture."

On March 16, 2006, appellant was placed at Boy's Republic in San Bernardino County. He left without permission seven days later. On March 27, an original petition was filed in San Bernardino County, alleging that appellant had committed felony burglary (Pen. Code, § 459), three misdemeanor counts of identifying information theft (Pen. Code, § 530.5, subd. (d)), and misdemeanor resisting arrest (Pen. Code, § 148, subd. (a)(1)). Appellant matched the description of a suspect who stole a woman's purse at Sam's Club; he was observed removing the cash and credit cards from the purse in a Marshall's men's room, then found by the police hiding in the bushes. He attempted to flee, was shot with a taser gun and apprehended, and was found in possession of the stolen credit cards and cash.

On March 28, the court reduced the burglary to a misdemeanor, and appellant admitted the five misdemeanor allegations. Appellant was transferred back to Alameda County. According to the subsequent dispositional report, appellant explained that he left Boy's Republic because he had told the staff where to find another boy who had absconded and that boy threatened to strangle appellant in his sleep. Appellant said he had planned to use the cash he stole for cab fare to his previous group home placement and the credit cards for food and clothing.

Appellant was placed at Aiming High Treatment Center in San Bernardino County on June 12, 2006. In July, it was reported that his initial progress was satisfactory, but after two weeks his behavior and attitude began to deteriorate, as he exhibited defiant

behavior, verbally abusing staff, and receiving incident reports for a number of behaviors. He was receiving passing grades in school.

On August 11, an original petition was filed in San Bernardino County alleging that appellant committed misdemeanor petty theft from a merchant, Sears (Pen. Code, §§ 484, subd. (a), 490.5) on July 16. A supplemental petition, filed in Alameda County on August 29, alleged that appellant had absconded from the Aiming High Treatment Center on August 21. This petition was subsequently dismissed on October 30. An amended petition, filed in San Bernardino County on September 29, 2006, alleged, in addition to the July 16 petty theft, that appellant committed felony first degree residential burglary (Pen. Code, § 459) and second degree burglary (Pen. Code, § 459) on September 28. In the September 28 incident, appellant was arrested in a residence he had apparently entered through a kitchen window. The first degree burglary count was dismissed, and appellant admitted the petty theft and second degree burglary.

Around this time, appellant's mother was temporarily living with relatives in Sacramento; his maternal grandmother told the probation officer that she and other relatives were ready to support appellant, but that his mother resented their involvement. After his September 28 arrest, while detained in San Bernardino Juvenile Hall, appellant stated that he wanted to commit suicide because his family had abandoned him; when he was transferred to Alameda County Juvenile Hall, he told a nurse that he wanted to kill himself. In a November 7 interview, appellant told the probation officer he was very worried about his mother and said he did not want to kill himself and was just depressed.

On November 21, the court placed appellant on electronic monitoring in the home of his aunt. He was reported to be adjusting satisfactorily until January 23, 2007, when he got into an argument with his aunt and a physical fight with her 14-year-old cousin. The aunt called the police, appellant told them he wanted to kill himself, and he was taken to the hospital for evaluation. He was temporarily placed in the home of a different aunt on January 24, and this placement was approved by the court on March 1.

On March 21, 2007, another petition was filed in Alameda County, alleging that appellant had absconded from his placement on March 18. According to a subsequent

dispositional report, appellant left his aunt's home after an argument about the suspension of his cell phone privileges and went to an apartment where his mother was living temporarily. After a few days, his mother was arrested for possession of drugs and weapons, and appellant lived on the street until April 2, when he was arrested for new offenses.

The subsequent petition filed on April 4, 2007, alleged felony robbery (Pen. Code, § 211), felony receiving stolen property (Pen. Code, § 496), felony attempted robbery (Pen. Code, §§ 664, 211) and misdemeanor battery (Pen. Code, § 242). Appellant and two others had been identified as having approached two people walking in Berkeley, punched one of the victims in the face, attempted to pull the other victim's purse from her shoulder, and taken the victim's cell phone which fell on the ground.

On April 25, appellant admitted the count of receiving stolen property, and the remaining counts in the April 4 petition were dismissed, as was the March 21 petition. The dispositional report related that appellant was very worried about his mother, having been told she was facing 14 years in prison, and was meeting with the Guidance Clinic regularly. On May 9, appellant was released from Juvenile Hall to his aunt on electronic monitoring.

On June 15, yet another subsequent petition was filed, alleging felony robbery (Pen. Code, § 211) committed the day before. According to the jurisdictional report, appellant was identified as the lead participant in a strong-arm robbery on a bus: He and a co-participant told the victim, " 'You have 10 seconds to empty your pockets,' and then relieved him of various bank and credit cards, AC Transit pass and BART tickets." The minors fled but were apprehended shortly thereafter and positively identified by the victim. On June 18, the petition was amended to allege felony theft from the person (Pen. Code, § 487, subd. (c)) rather than robbery, and appellant admitted the amended allegation. The dispositional report stated that a co-participant was the one who demanded the victim's possessions and appellant stood within a foot of the victim but did not say anything or touch the victim.

On October 25, 2007, appellant was placed at Rite of Passage in Nevada. In December, he was reported to be performing "relatively well" at the program and doing well in school. On February 1, 2008, however, appellant was returned to Juvenile Hall when staff at Rite of Passage determined he did not have the "cognitive ability" and "verbal reasoning skills" to complete the program. The probation department reported that appellant had been screened for and accepted by Camp Sweeney.

At a hearing on February 19, the court ordered a guidance clinic evaluation for appellant. This evaluation, completed in March 2008, indicated that appellant had a moderate level of anxiety and symptoms indicating Attention Deficit Hyperactivity Disorder (ADHD) and Conduct Disorder; intelligence in the low average range; and potential for violence in the average range.

Appellant was released to his aunt on home supervision on March 18. An update report filed on April 15 stated that appellant was doing well, with no problems reported by his aunt.

On April 29, 2008, a supplemental petition was filed, alleging that appellant had absconded on April 26. A new subsequent petition was filed on May 14, alleging felony robbery (Pen. Code, § 211), felony attempted robbery (Pen. Code, §§ 664, 211), two counts of felony kidnapping (Pen. Code, § 209, subd. (a)) and misdemeanor providing false identification to a police officer (Pen. Code, § 148.9). As described in the jurisdictional report, appellant and co-participant Smith approached two victims at a bus stop on May 13, 2008; appellant told the victims to move behind a building in the parking lot while Smith held his hand inside his jacket and said he would shoot the victims if they did not comply; appellant and Smith demanded the victims' cell phones and one of the victims "gave it to Smith." Patrolling police officers saw the incident and arrested the two perpetrators, and appellant was returned to Juvenile Hall. The police reports and victims' statements indicate that the victims did not have cell phones, but one of them gave Smith his bus pass, and that the victims believed Smith had a weapon and feared for their lives. The subsequent petition, filed May 14, requested a determination whether

appellant was a fit and proper subject under juvenile court law. (Welf. & Inst. Code, § 707, subd. (c).)

On June 10, the probation officer filed an Application for Psychotropic Medication. The Prescribing Physician's Statement attached to the application reflected that Dr. Harinder Auluck had evaluated appellant on June 2, diagnosed Mood Disorder and Adjustment Disorder with Anxiety/Conduct Disorder, and prescribed the medications Depakote and Seroquel. The stated symptoms for which the medication was being prescribed were "[e]xcessive mood swings, anger, punches walls, has a history of suicidal ideation, somatic complaints. Mother is bipolar." It was stated that appellant's aunt was reluctant to sign a consent for the medication, but appellant felt he needed help and was agreeable. The request for medication was granted on June 11.

The Welfare and Institutions Code section 707 behavioral study, filed on June 19, concluded that 16-year-old appellant did not meet the criteria for retention in the juvenile court system because he had an extensive history with the probation department and had exhausted all of the services within the juvenile division; and the present offense involves criminal sophistication in that it was "premeditated, predatory, and the use of fear and intimidation were employed." The report noted that, while appellant had previously been "friendly and open" in talking with the probation officer, in the interview on the current incarceration he "had an attitude" and "did not appear at all affected or impressed" when the probation officer attempted to explain the seriousness of the situation. Appellant admitted using marijuana but denied other drug use.

On August 5, appellant admitted the robbery alleged in the May 14 subsequent petition, and the other counts were dismissed. The prosecution withdrew the Welfare and Institutions Code section 707 motion. The April 29 supplemental petition was dismissed.

The dispositional report concluded that in light of the failure of extensive efforts to rehabilitate appellant and the increasing "level of sophistication, aggressive behavior, and predatory mentality," the only viable option was a commitment to the Department of Juvenile Justice (DJJ). The report stated that appellant had been screened and found an appropriate candidate for DJJ, that Camp Sweeney had found appellant ineligible due to

his mental health diagnosis, flight risk, and need for a level of supervision the program could not provide, and that Rite of Passage and Boy's Republic had found appellant inappropriate for their programs. Appellant's co-participant in the May 13 incident had been referred to Adult Investigations, pled nolo contendre to felony robbery, and was placed on five years' probation with six months in jail.

At a hearing on August 20, 2008, the court expressed "dismay," after reading the probation report, that "[i]n some ways I feel like we are saying that Antonio is a throwaway kid, that he's reached the end of his rope, and that there's nothing more that can be done." On the other hand, the court noted appellant's long history of referrals and services. The court expressed some misgivings about DJJ, but tended to agree with the probation recommendation.

Appellant's attorney argued it was an injustice for appellant to be treated so differently from his 18-year-old co-participant, who had been sentenced to 90 days in jail (not the six months indicated in the probation report) and five years on probation. Counsel also told the court, and appellant confirmed, that the probation officer had not interviewed appellant before writing the dispositional report. The court acknowledged that there was often a disparity in the sentences imposed upon adults as compared to minors and, while pointing out that this could reflect the rehabilitative aspect of juvenile sentencing, expressed concern about the resulting unfairness. The court was also concerned about the probation officer not talking with appellant. Appellant's mother begged the court to help appellant change and not send him to DJJ where, because he was a follower, he would learn more serious criminal behavior. The court ordered that appellant be screened again for Camp Sweeney, seeking an explanation for why appellant had been found acceptable in February 2008, but now was not acceptable; advised appellant that if he was not accepted, he would be committed to DJJ; and spoke at length to appellant about the need for him to think about his choices and exercise good judgment even if this was in fact the disposition.

In a report filed August 28, the probation officer related that Camp Sweeney had found appellant inappropriate due to his mental health diagnosis. In an August 26

interview, appellant had told the probation officer he did not commit the robbery and admitted it only because "his attorney said it was a better option than being remanded to adult court," that his attorney only talked to him briefly before court appearances and did not fully discuss his case, and that he wanted a re-trial and a new attorney. The probation officer reiterated the prior recommendation that DJJ was the only option for disposition.

At a hearing on August 28, after acknowledging that appellant had been found ineligible for Camp Sweeney because of his mental health diagnosis, the court stated it was "disappointed" that appellant was now disclaiming responsibility for his actions and that appellant's complaints about his attorney should have been brought to the court's attention before, not after, admitting responsibility and then recanting. After stating that there were programs in DJJ to benefit appellant, the court found that appellant's "mental and physical condition and qualifications are such as to render it probable that he will be benefited by the reformatory educational discipline or other treatment provided by the Department of Juvenile Justice." Appellant was committed to the DJJ for a maximum term of eight years eight months.

Appellant filed a timely notice of appeal on September 19, 2008.

DISCUSSION

I.

As indicated above, in the August 28, 2008 memorandum to the court, appellant's probation officer related appellant's assertion that he was innocent of the current offenses and complaints about his attorney. Appellant told the probation officer he "only admitted to [the robbery] because his attorney said it was a better option than being remanded to adult court. He further stated that his attorney only talks to him for two minutes prior to each court appearance and that it is never enough time to fully discuss his case. Antonio stated that he would like a re-trial and a new attorney. He further reported that if he had committed this crime he would have been dressed differently, that it would have never occurred on International B[oulevard] and he would have ran when the Police Officers pulled up. He believes he was set up by the Oakland Police Department."

Appellant argues the court erred in not responding to these statements by holding a *Marsden* hearing. "*Marsden* and its progeny require that when a defendant complains about the adequacy of appointed counsel, the trial court permit the defendant to articulate his causes of dissatisfaction and, if any of them suggest ineffective assistance, to conduct an inquiry sufficient to ascertain whether counsel is in fact rendering effective assistance. (*Marsden, supra,* 2 Cal.3d at pp. 123-124; *People v. Crandell* (1988) 46 Cal.3d 833, 854, abrogated on another point in *People v. Crayton* (2002) 28 Cal.4th 346, 364-365.) If the defendant states facts sufficient to raise a question about counsel's effectiveness, the court must question counsel as necessary to ascertain their veracity. (*People v. Turner* (1992) 7 Cal.App.4th 1214, 1219; *People v. Penrod* (1980) 112 Cal.App.3d 738, 747.) [¶] . . . [¶] . . . '[T]he trial court should appoint substitute counsel when a proper showing has been made at any stage. A defendant is entitled to competent representation at all times, including presentation of a new trial motion or motion to withdraw a plea.' (*People v. Smith* [(1993)] 6 Cal.4th [684,] 695.) Whether a request for substitute counsel is made before or after conviction, '[t]he court must allow the defendant to express any specific complaints about the attorney and the attorney to respond accordingly.' (*Id.* at p. 694.)" (*People v. Eastman* (2007) 146 Cal.App.4th 688, 695-696.)

"While the law does not require that defendant use the word '*Marsden'* to request substitute counsel, we will not find error on the part of the trial court for failure to conduct a *Marsden* hearing in the absence of evidence that defendant made his desire for appointment of new counsel known to the court." (*People v. Richardson* (2009) 171 Cal.App.4th 479, 484, citing *People v. Dickey* (2005) 35 Cal.4th 884, 920-921.) " ' "Although no formal motion is necessary, there must be 'at least some clear indication by defendant that he wants a substitute attorney.' " (*People v. Mendoza* (2000) 24 Cal.4th 130, 157, quoting *People v. Lucky* (1988) 45 Cal.3d 259, 281, fn. 8.)' (*People v. Valdez* (2004) 32 Cal.4th 73, 97.)" (*People v. Dickey, supra,* 35 Cal.4th at p. 920.)

Appellant argues that the statements related in the probation report gave the juvenile court cause to question whether appellant was receiving effective assistance of counsel. He urges that the court erred in failing to conduct a hearing to investigate his

complaints and, instead, expressing disappointment with appellant's disavowal of the responsibility he had previously taken with his admission of the offense.[2]

The problem with appellant's position is that he never made his desire for appointment of substitute counsel known *to the court.* Appellant never voiced any concern about his representation at the dispositional hearing (or any other one), never told the court he wanted a different attorney and, when asked by the court whether he had had an opportunity to discuss his case with his attorney, answered affirmatively. Even when the court specifically mentioned having read in the probation report about appellant's complaint regarding his attorney, appellant did not tell the court that he felt his representation was inadequate or that he wanted a different attorney. Indeed, appellant was in fact represented by a different public defender at the final dispositional hearing on August 28 than the one who had represented him at the previous hearings on the current petition. Appellant's mother addressed the court at length at both hearings, but never mentioned appellant's professed innocence or any concern regarding appellant's representation. In these circumstances, we find no error in the court's failure to conduct a *Marsden* hearing that appellant did not request.[3]

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[2] The court stated it was "disappointed in continuing to read the disposition report that the minor is now not taking responsibility for his actions, and that bothers me. It's very troublesome when minors go out and commit crimes—anybody for that matter—and then all of a sudden because things are not going their way they start changing their story and take no responsibility at all when you harmed a victim. That doesn't sit very well with me. [¶] Although I do also read that you feel that you have not really had an opportunity to speak with your attorney until just a couple minutes after court, or before court, and these are things that you should have brought to the court's attention before now, you don't do it after admitting responsibility and then trying to recant and say that you are no longer are responsible."

[3] Appellant appears to argue that there was evidence of ineffective assistance of counsel in that appellant's sentence significantly exceeded that of his adult co-participant, who received probation with a short jail term, and appellant's admission subjected him to a potential strike for a "comparatively trivial bus stop incident." The incident was undoubtedly more than trivial for the victims, who believed they were being robbed at gunpoint. The incident was observed by police officers. Appellant's admission, which kept him in the juvenile justice system and resulted in the dismissal of several other

II.

Appellant contends the orders must be reversed because the record does not establish that he was competent to enter an admission. "It is well established that the criminal trial of an incompetent defendant violates the due process clause of the state and federal Constitutions. (*Medina v. California* (1992) 505 U.S. 437, 453.) Like an adult defendant, a minor has a right to a competency hearing in juvenile delinquency proceedings. (*James H. v. Superior Court* (1978) 77 Cal.App.3d 169, 174-175.) The standard applied in adult criminal proceedings is also applied in juvenile delinquency proceedings, namely, whether the accused ' " 'has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding—and whether he has a rational as well as factual understanding of the proceedings against him.' " ' (*Timothy J. v. Superior Court* (2007) 150 Cal.App.4th 847, 852, 857.)" (*In re Ricky S.* (2008) 166 Cal.App.4th 232, 234.) "If the court finds that there is reason to doubt that a child who is the subject of a petition filed under [Welfare and Institutions Code] section 601 or 602 is capable of understanding the proceedings or of cooperating with the child's attorney, the court must stay the proceedings and conduct a hearing regarding the child's competence." (Cal. Rules of Court, rule 5.645(d).)

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charges against him, is hardly surprising. Although unsuccessful, both of the public defenders who represented appellant at the dispositional hearings argued strenuously for a less severe disposition; at the final hearing, defense counsel expressed outrage at Camp Sweeney's refusal to accept appellant because of his mental health status when the evaluations did not indicate he had a "serious psychological disturbance." It was this refusal that dictated the court's ultimate decision: The court made clear it would have placed appellant at Camp Sweeney if he had been accepted. Moreover, it was not only the robbery itself, but the robbery in the context of appellant's lengthy record of offenses and unauthorized leaving from placements that resulted in appellant's commitment to DJJ. That appellant's co-participant received a comparatively light sentence, as the juvenile court explained, does not negate the appropriateness of appellant's sentence: Appellant was being offered rehabilitative programs through the juvenile court system, and the record offers no evidence regarding his co-participant's criminal history or lack thereof.

Appellant argues that the circumstances were "more than sufficient" to raise a doubt as to his competence in that Rite of Passage had returned him from the placement because he lacked the "cognitive ability" to complete the program, and the court had signed an order for administration of psychotropic drugs to him.

That Rite of Passage found appellant lacked the "cognitive ability" and "verbal reasoning skills" to complete its rehabilitative program does not indicate that appellant lacked the " ' " 'reasonable degree of rational understanding' " ' " (*In re Ricky S.*, *supra,* 166 Cal.App.4th at p. 234) necessary to be competent to admit his offense. Appellant had undergone a number of mental health evaluations, none of which suggested a lack of competence. The April 2005 evaluation found appellant showed "significant behavioral impulsivity" and "a severe expressive language disorder," but "near average nonverbal intelligence" and "no evidence of a more significant psychiatric disorder" or "formal thought disorder." The February 2006 evaluation found appellant suffered from very low self esteem and depression and lacked behavior control; the evaluator noted that appellant "read the test instructions correctly and appeared to understand what was required of him," "did not appear to have difficulty in his reading skills," and "asked for clarification if he did not understand a vocabulary word." The March 2008 evaluation found that appellant had a moderate level of anxiety, symptoms indicating Attention Deficit Hyperactivity Disorder and Conduct Disorder, low average intelligence, and potential for violence in the average range.

While the evaluations thus identify a number of issues confronting appellant, none indicate an inability to understand the proceedings or consult and cooperate with his attorney. Indeed, the probation reports consistently refer to appellant as "street smart," "streetwise" and "rather sophisticated," with an early dispositional report describing him as having "a rather good understanding of the Court/Probation system despite his young age." At the August 5, 2008 hearing, when appellant admitted the robbery allegations of the current petition, he stated that he understood the rights he was giving up by entering the admission and the consequences of the admission, had no questions, and had had an opportunity to discuss the case with his attorney. His attorney consented to the admission

and did not raise any question about appellant's competence. At the dispositional hearing, defense counsel argued that appellant was not intellectually impaired and did not have a "serious emotional disturbance."

Appellant argues that the fact the judge signed the order for administration of psychotropic drugs should have led the judge to question whether appellant's psychiatric problems rendered him incompetent and whether the medications made him "too dull, drowsy, and apathetic to make an intelligent choice" about his plea. The symptoms for which appellant was prescribed psychotropic medication were "[e]xcessive mood swings, anger, punches walls, has a history of suicidal ideation, somatic complaints." These symptoms do not point to an inability to understand the legal proceedings and communicate with counsel. As for the effects of the medication, appellant points to the various side effects known to be associated with psychotropic medication in general and the medications he was prescribed in particular. He points to nothing, however, suggesting he suffered from any of these side effects.

As appellant explains, psychotropic medication has potential side effects that courts have recognized can impair constitutionally protected trial rights by interfering with the medicated defendant's ability to communicate with counsel, participate in making decisions, and otherwise participate in the defense. (*Riggins v. Nevada* (1992) 504 U.S. 127, 137; *id.* at p. 144 (conc. opn. of Kennedy, J.) (*Riggins*).) " 'First, the drugs "tinker[] with the mental processes," [citation], affecting cognition, concentration, behavior, and demeanor. While the resulting personality change is intended to, and often does, eliminate undesirable behaviors, that change also, if unwanted, interferes with a person's self-autonomy, and can impair his or her ability to function in particular contexts.' (*U.S. v. Williams* (9th Cir. 2004) 356 F.3d 1045, 1054 (*Williams*), citing *Riggins, supra,* 504 U.S. at p. 137.)" (*Carter v. Superior Court* (2006) 141 Cal.App.4th 992, 1000.) Consequently, psychotropic medication can be administered to a defendant involuntarily to render the defendant competent to stand trial "only if the treatment is medically appropriate, is substantially unlikely to have side effects that may undermine the fairness of the trial, and, taking account of less intrusive alternatives, is necessary

significantly to further important governmental trial-related interests." (*Sell v. United States* (2003) 539 U.S. 166, 179; see Pen. Code, § 1370, subd. (a)(2)(B)(ii)(III); *People v. O'Dell* (2005) 126 Cal.App.4th 562, 569.)

Appellant is not challenging the order approving administration of psychotropic medication. Rather, he is contending that, because he was taking drugs that are known to have side effects that *might* impair abilities bearing on his competence to admit the offense, the trial court was required to find a doubt as to his competence and hold a hearing on the question. He points to nothing in the record indicating he actually suffered any of these side effects, nor even evidence that such effects would be likely at the dosage he was administered. Appellant's attorney raised no question about his competence. The trial court observed appellant at several hearings after signing the order for psychotropic medication. In these circumstances, appellant effectively asks us to hold that a court, of its own initiative, *must* find a doubt as to a defendant's competence whenever the defendant is taking psychotropic medication. We decline to do so.

III.

Appellant next contends judgment must be reversed because the trial court did not exercise its discretion in setting his maximum term of confinement. When a minor is committed to DJJ, "the juvenile court is required to indicate the maximum period of physical confinement. (Welf. & Inst. Code, § 726, subd. (c).) In setting that confinement period, which may be less than, but not more than, the prison sentence that could be imposed on an adult convicted of the same crime, the court must consider the 'facts and circumstances' of the crime. (§ 731, subd. (c).)" (*In re Julian R.* (2009) 47 Cal.4th 487, 491-492.)

Appellant maintains that the court here failed to exercise its discretion, as shown by the fact that the judge computed the maximum term of confinement based on the upper term for robbery and aggregation of appellant's prior offenses without mentioning any discretion to prescribe a lower maximum term. He urges that there is no reason to believe the court would have imposed the aggravated term for the robbery and aggregated all the prior offenses in a conscious exercise of discretion because the robbery was "mild

as robberies go," most of the past offenses were committed when appellant was 12 or 13 years old, and the judge was reluctant to commit appellant to DJJ at all, doing so only after he was rejected by Camp Sweeney.

The record is silent as to the court's exercise of discretion. The maximum term calculation to which appellant refers was made not at disposition but during the court's admonishments before appellant admitted the robbery: In advising appellant of the maximum term of confinement he could face on the robbery admission, the court calculated a maximum term of 10 years 10 months based on the upper term for the robbery and one-third terms for the prior offenses, noting that "[t]here might be some discrepancy" about the total, "which we will correct at the time of disposition." At the first dispositional hearing, when the court officer asked about the maximum term, the district attorney stated she calculated it to be eight years eight months. The court committed appellant to DJJ at the subsequent dispositional hearing without mentioning the maximum term of confinement on the record. The court minutes state the maximum term as eight years eight months. The order of commitment to DJJ lists the current offense and four prior offenses, with the upper term of five years for the robbery and one-third middle terms for the prior offenses, for a maximum period of confinement of eight years eight months.

Our Supreme Court recently rejected the contention that where the juvenile court does not state on the record that it considered the facts and circumstances that might justify a maximum period of confinement less than the maximum adult term, the reviewing court should presume the juvenile court was unaware of or failed to perform its duty to do so. (*In re Julian R., supra,* 47 Cal.4th at p. 498.) *Julian R.* held that such a presumption would "require the reviewing court 'to ignore a cardinal principle of appellate review': A ' " 'judgment or order of the lower court is presumed correct[, and a]ll intendments and presumptions are indulged to support it on matters as to which the record is silent, and error must be affirmatively shown.' " [Citation.]' As this court has stated, 'we apply the general rule "that a trial court is presumed to have been aware of and followed the applicable law. [Citations.]" ' (*People v. Stowell* (2003) 31 Cal.4th

1107, 1114.) 'This rule derives in part from the presumption of Evidence Code section 664 "that official duty has been regularly performed," ' and thus when 'a statement of reasons is not required and the record is silent, a reviewing court will presume the trial court had a proper basis for a particular finding or order.' (*Ibid.*)" (*In re Julian R.*, at pp. 498-499.) Because the juvenile court in *Julian R.* set a maximum period of confinement by completing the "appropriate Judicial Council commitment form," the Supreme Court presumed "that (1) the court exercised its discretion in setting a maximum period of physical confinement that was measured against both the ceiling set by the maximum adult prison term and a possibly lower ceiling set by the relevant 'facts and circumstances' ([Welf. & Inst. Code,] § 731, subd. (c)), and (2) the court determined that [the minor's] appropriate confinement period was a period equal to the maximum adult term." (*In re Julian R.,* at p. 499.)

Julian R. compels us to reach the same result here. Appellant has not demonstrated anything in the record to distinguish *Julian R.* and overcome the presumption that the juvenile court exercised its discretion in setting the maximum term of confinement.

IV.

Appellant next urges the dispositional order should be reversed because there was insufficient evidence he would benefit from the commitment to DJJ. Under Welfare and Institutions Code section 734, "[n]o ward of the juvenile court shall be committed to the Youth Authority unless the judge of the court is fully satisfied that the mental and physical condition and qualifications of the ward are such as to render it probable that he will be benefited by the reformatory educational discipline or other treatment provided by the Youth Authority."[4] "The appellate court reviews a commitment decision for abuse of discretion, indulging all reasonable inferences to support the juvenile court's decision. (*In re Robert H.* (2002) 96 Cal.App.4th 1317, 1329-1330; *In re Asean D.* (1993)

[4] The DJJ was previously called the Youth Authority or California Youth Authority (CYA). References to DJJ and CYA are to the same institution.

14 Cal.App.4th 467, 473.) Nonetheless, there must be evidence in the record demonstrating both a probable benefit to the minor by a CYA commitment and the inappropriateness or ineffectiveness of less restrictive alternatives. (*In re Pedro M.* (2000) 81 Cal.App.4th 550, 555; *In re Teofilio A.* (1989) 210 Cal.App.3d 571, 576-577.)" (*In re Angela M.* (2003) 111 Cal.App.4th 1392, 1396.)

Although the juvenile court expressed misgivings about committing appellant to DJJ, it recognized appellant's long history of referrals and services and that "despite all of the attempts to rehabilitate Antonio, he has either not wanted to, or has been incapable of adjusting and changing and modifying his behavior." As the court noted, appellant had been tried on probation, home supervision and electronic monitoring, and been referred to family preservation, in efforts to keep him at home, and had participated in "multi-systemic therapy," but continued to "commit crimes, AWOL from placements, used drugs, and defy and disobey the court orders." Appellant had been screened and found not a proper candidate for family preservation, not eligible for Camp Sweeney, Rites of Passage and Boys Republic, and an appropriate candidate for DJJ. The court expressly recognized the difficult circumstances of appellant's background, with siblings in and out of jail, his father a homicide victim, and his mother struggling, but felt appellant's behaviors "demonstrate that he doesn't care, that he is destined or he has chosen a life of crime," and that despite the many unhappy obstacles he has had to confront, "there has to be a certain degree of accountability and responsibility." Moreover, the court realized there was no less onerous sentencing alternative available.

Before committing appellant to DJJ, the court referred the case to be re-screened for Camp Sweeney; appellant was again found ineligible due to his mental health diagnosis. The court explained to appellant: "The fact of the matter is I was trying to give you the benefit of the doubt based on your background . . . and thought that if eligible that I would try you at Camp Sweeney, but your background is horrible. . . . [¶] And the fact of the matter is that even though I struggled with whether I wanted to send you to DJJ, there are programs at DJJ that can benefit you. I am just hoping that you don't get there and fall into the wrong crowd and continue your criminal behaviors.

I think that is a personal choice and decision that you have to make, and you have to be the one who wants to change things around." When appellant's mother pleaded with the court that appellant's offenses were all theft offenses to obtain things he "needed" because he was out on the street (clothing, money for clothes) rather than things he "wanted" (video game, cell phone), and that DJJ was really "baby prison," the court responded, "I think he needs that kind of intensity given his history." The court did not accept appellant's mother's statement that appellant's "cognitive development and psychiatric needs [are] not going to be met" at DJJ.

Appellant argues that the court did not explore his psychiatric needs in connection with the DJJ commitment, suggesting that the "seemingly hasty and poorly documented interaction" with him reflected in the physician's statement attached to the application for psychotropic medication "leaves open the question" whether appellant was "casually drugged to render him more docile, malleable, and trouble-free at Juvenile Hall" or "really suffers from a major mental illness requiring medication."[5] We cannot explain why, as appellant points out, the portion of the commitment form calling for information as to whether the youth has been prescribed psychotropic medication was left blank. The record of the dispositional hearings, however, leaves no doubt that the court was well aware of appellant's mental health status, as it factored into Camp Sweeney's ineligibility findings, the arguments of defense counsel and appellant's mother, and the court's comments. The very fact that the commitment form provides for information regarding

[5] As indications that the medical evaluation was not properly conducted, appellant notes that where the form filled out by the prescribing physician asked for a description of the child's symptoms and, for a child not presently taking psychotropic medication, a description of treatment alternatives that have been tried within the last six months or explanation why alternatives have not been tried, the entire response was, "[e]xcessive mood swings, anger, punches walls, has a history of suicidal ideation, somatic complaints. Mother is bipolar." Other responses indicated "none" for "relevant medical history" and, for relevant laboratory tests, "[p]lan is to obtain lab when medication is started." Under "relevant medical history," where the form asked for the date of last physical examination, the response was "none." The "administration schedule" section of the form, noted to be optional, was left blank.

treatment with psychotropic medication reflects the familiarity of DJJ with minors undergoing such treatment and we presume the court considered the availability of continued treatment among the benefits potentially available to appellant. As the form itself also reflects, appellant would in any event have been evaluated by a DJJ physician for the necessity of psychotropic medication.

Appellant also urges that the court should have considered the potential harm appellant faced "through contact with violent, hardened criminal youths" at DJJ. As he acknowledges, the court did express concern on this very point. Appellant regards the court as "naive" in telling appellant he had a choice whether to "follow" or "lead" at DJJ, but the fact remains that the court considered this aspect of the commitment to DJJ and determined that appellant nevertheless stood to benefit from the rehabilitative and other programs offered through DJJ. There is no basis for us to find an abuse of discretion in this determination.

V.

Appellant's final contention is that the DJJ commitment constituted cruel and unusual punishment in violation of the state and federal constitutions. Although we could view this argument as waived by appellant's failure to raise it in the trial court (*People v. Kelley* (1997) 52 Cal.App.4th 568, 583), we elect to address it.

" '"To determine whether a sentence is cruel or unusual as applied to a particular defendant, a reviewing court must examine the circumstances of the offense, including its motive, the extent of the defendant's involvement in the crime, the manner in which the crime was committed, and the consequences of the defendant's acts. The court must also consider the personal characteristics of the defendant, including age, prior criminality, and mental capabilities. [Citation.] If the court concludes that the penalty imposed is 'grossly disproportionate to the defendant's individual culpability' [citation], or, stated another way, that the punishment ' " 'shocks the conscience and offends fundamental notions of human dignity' " ' [citation], the court must invalidate the sentence as unconstitutional." [Citation.]' [Citation.]" (*People v. Wallace* (2008) 44 Cal.4th 1032, 1099, quoting *People v. Leonard* (2007) 40 Cal.4th 1370, 1426-1427.)

Appellant argues that the five years of the maximum period of confinement attributable to the current robbery admission was grossly disproportionate to his culpability. By his characterization, his personal involvement in the offense was "non-existent" because his co-participant "did everything"; the manner in which the offense was committed "could have been a great deal worse" as no weapons or violence were used and it occurred on a "well-travelled thoroughfare"; there were no consequences to the offense, because the bus pass was returned promptly to the victims; and appellant's motivation might have been simply that he "wanted a little money for his immediate use" or he might only have been accompanying his co-participant. Appellant urges that the superior court, in sentencing the co-participant, "recognized all of these mitigating circumstances by sentencing [Smith], who was older and more culpable than Antonio, to only 90 days in the county jail."

Appellant's argument overly minimizes the significance of the offense. That no weapons were actually used is beside the point for the victims, who believed that Smith had a weapon under his jacket, as they were obviously intended to from Smith's holding his hand under the jacket and threatening to shoot them; that the stolen property was returned, or did not carry great monetary value, does not diminish the threat of violence and fear instilled in the victims during the incident. Similarly, while the fact that appellant and Smith were stopped by the police resulted in the offense taking place on a main street, the victims initially were told, at apparent gunpoint, to move behind a building. Appellant's characterization of his motive, of course, is purely speculative, and at odds with appellant's history of committing theft offenses. Also speculative is appellant's assumption about the superior court's reasoning in sentencing Smith to probation. As has been indicated, the record contains no information about Smith's criminal history. The record does demonstrate, however, that the juvenile court viewed the robbery as a serious offense both in itself and as demonstrating an escalation in appellant's criminal conduct. At the final dispositional hearing, when appellant's attorney argued that DJJ was for the "worst of the worst juvenile offenders" and that the current offense "showed a lack of judgment," "disregard for social rules" and "lack of

empathy for the victims," but was "not even close to the worst of the worst," the court responded, "I don't know if you are hearing yourself. This minor has become a predator. He's been committing crimes since he was 12 years old. He has been—there have been a number of interventions in terms of services that have been offered to this minor, and he continues—in fact, his behaviors are escalating."

Appellant further attempts to portray the portion of the maximum term attributable to his prior offenses as disproportionate to his culpability because he was young when a number of them were committed, they assertedly were non-violent—appellant apparently ignores the robbery in which one of the victims was punched and does not view snatching a purse from a victim's shoulder as a violent act—and appellant is a troubled young man with learning disabilities, coming from a shattered home. As has been stated repeatedly, appellant's history of offenses and non-compliance with court orders was extensive. The court was sympathetic to the difficulties of appellant's background, but concluded that the time had come for appellant to be required to take responsibility for his conduct. The DJJ commitment does not "shock[] the conscience" or "offend[] fundamental notions of human dignity." (*People v. Wallace*, *supra*, 44 Cal.4th at p. 1099.)

The orders are affirmed.

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Kline, P.J.

We concur:

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Haerle, J.

_____
Lambden, J.